California Regional Water Quality Control Board
Santa Ana Region

August 13, 2004

ITEM: 20

SUBJECT: Progress of the San Diego Creek Special Area Management Plan (SAMP)

DISCUSSION:

Regional Board staff has been meeting regularly with staff from the U.S. Army Corps of Engineers (Corps), Department of Fish and Game, The Irvine Company, City of Irvine, Irvine Ranch Water District, and other local agency stakeholders regarding the finalization of CEQA (and the federal NEPA) documents for the proposed San Diego Creek watershed SAMP. The SAMP is essentially a watershed-specific regulatory and mitigation program for discharges of dredge and fill to waters of the United States. Because of the potential impacts of the SAMP on inland aquatic resources, the release of the draft EIR to the public has the potential to be controversial. The Department of Fish & Game, in close coordination with the Corps, is developing a Master Streambed Alteration Agreement (MSAA) for their own permitting purposes, to compliment the SAMP.

The SAMP process is largely in response to criticisms and recommendations for mitigation approaches discussed in the National Academy of Sciences' report "Compensating for Wetlands Losses Under the Clean Water Act" (2001). Regional Board staff expects that implementation of the SAMP, in conjunction with the MSAA, will streamline the regulatory process for specific projects or types of projects that are specifically identified in the SAMP documents and that entail dredge and fill activities. This regulatory process includes issuance of Clean Water Act Section 404 permits by the Corps, Section 401 water quality standards certifications by the Regional Board, and Streambed Alteration Agreements by the Department of Fish and Game pursuant to the authority specified in Section 1600 of the Fish and Game Code. The SAMP would create an alternate Section 404 permitting process.

At the present time, these projects must be considered on a case-specific basis, an approach that does not take cumulative effects and appropriate mitigation into account in the most effective or ecologically sound manner. This approach is also time and resource intensive, both for the agencies involved and for project proponents. Some of these projects, which entail minor impacts on waters of the U.S. associated with channel maintenance, bridge and road repair, etc., still require substantial expenditure of staff time. The SAMP and MSAA would provide both regulatory streamlining and advance awareness by project applicants of the requirements and conditions that can be expected to pertain to their projects.

The SAMP relies on the development of a holistic mitigation strategy that first establishes the baseline condition of the functions and values of aquatic resources within the San Diego Creek watershed. The SAMP then identifies areas targeted for

conservation based, in part, on the level of effort needed to improve the ecological function and value of the resource and the expected increase in the environmental importance of the resource. The SAMP then attempts to direct mitigation efforts (for projects that fill water bodies) towards those resource conservation areas that have the potential to maintain or improve the functions and values of aquatic resources in the watershed as a whole. Many of the aquatic resource conservation areas identified in the SAMP are on properties already under some form of direct or indirect resource protection.

Although generally supportive of the SAMP's holistic approach to mitigating impacts to waters of the U.S., Regional Board staff has raised a number of concerns regarding the process for implementing the SAMP. First, the SAMP's mitigation strategy is largely driven by ecological considerations. Clearly, these are very important. However, Regional Board staff believes that with this focus, the SAMP has significant potential to ignore or discount impacts to non-ecological beneficial uses such as REC1 (water contact recreation), REC2 (non-contact recreation), and groundwater recharge (GWR). Because the SAMP does not address this concern, Board staff has carefully considered the types of projects for which a general 401 certification should be approved.

Because the SAMP will direct where project proponents' mitigation efforts occur, the locations where certain beneficial uses occur within the San Diego Creek watershed may be redistributed with potential environmental justice implications. For example, under the SAMP's mitigation strategy, the fill of a creek could eliminate its REC2 beneficial uses to a local community. The project that caused the fill, however, may not compensate the affected community for its loss of REC2 opportunities because the project's economic benefits, goods and services (housing, retail and commercial services, etc.) may not be directed to the affected community's demographics. This issue cannot be addressed without an understanding of population demographics in proximity to the waters that will ultimately be filled. The Corps has assured Regional Board staff that these environmental justice issues will be addressed through the Corps internal directives to consider socio-economic impacts of the SAMP.

Regional Board staff has also questioned the Corps' ability to assure that the overall health of the watershed will be maintained during the implementation of the SAMP. The SAMP's approach to evaluating the functions and values of aquatic resources relies not only on the inherent attributes of a water body, but its relative position to and connectivity with other water bodies (i.e., fragmentation) in the watershed. Projects can have the effect of synergistically reducing the functions and values of a water body through fragmentation, resulting in a cumulative adverse impact on beneficial uses.

Because the timing, extent, and location of projects that will fill waters is not fully known, the potential exists that there will be periods during which water bodies in the watershed may be more fragmented, and the overall health of the watershed reduced, from the baseline condition. In order to address this, the Corps has developed a method of determining mitigation that depends on the functions and value of the impacted drainage and the existing and potential functions and values of the conservation area. This approach is much more advanced than traditional best-

professional judgment and case-by-case methods, which have a greater likelihood of failing to maintain overall watershed health. However, the Corps acknowledges that there will always be uncertainty regarding the overall functional value of the watershed at any given time during the implementation of the SAMP.

Regional Board staff has considered these limitations and options to streamline the 401 certification process for projects that will be addressed by the SAMP. As previously stated, with advice from Regional Board staff and staff of other agencies, the Corps has developed an administrative draft EIR/EIS for the SAMP and will be submitting it to Regional Board staff and others for comments. The issuance of any 401 Certification requires that an appropriate CEQA document be certified. Hence, certification of the Corps' CEQA document for projects addressed by the SAMP would enable Board staff to consider 401 certification for those projects in a broad, rather than case-specific manner.

In addition to the issuance of 401 certification for projects involving dredge and fill, the Regional Board is obligated under the Water Code to impose appropriate waste discharge requirements (unless the Regional Board has previously approved a waiver for such discharges; this is not presently the case). This aspect of the project approval process is facilitated by the recent adoption by the State Board of general waste discharge requirements for discharges covered by a Clean Water Act Section 401 Water Quality Standards Certification (Certification). These requirements specify that project proponents must comply with the conditions specified in 401 certifications.

Board staff will recommend that a general certification be issued for some but not all projects and types of projects for which mitigation will be addressed in the SAMP. This general certification would rely upon the Corps CEQA certification and would specify that compliance is to be achieved with the State Board's general waste discharge requirements for dredge and fill projects for which 401 certifications have been issued. This approach has substantial advantages for both project proponents and Board staff. Projects that are identified in the general 401 certification could proceed more expeditiously; they would be essentially pre-certified, as long as the conditions specified in the general 401 certification are met and provided that Board staff concurs that the general 401 certification is applicable. Board staff would be required only to review the projects sufficiently to affirm that the projects are reasonably covered under the general certification, without need for detailed project review and issuance of individual certifications with appropriate conditions. Reliance upon the State Board's general waste discharge requirements as part of the general 401 certification conditions would obviate the need for the Regional Board to adopt individual waste discharge requirements, or to conduct the CEQA analysis that would be necessary for the Regional Board to consider adoption of general waste discharge requirements for these projects.

Board staff believes that it is inappropriate to issue Certification for either the SAMP as a whole or to certify SAMP-derived Corps 404 permits that would apply to a wide range of activities. The SAMP and its permitting processes contrast with the existing Corps Nation Wide Permit (NWP) process, in which NWPs are sufficiently focused on specific types of projects such that the State Board has found it appropriate to

certify specific NWPs. The general certification proposed by Regional Board staff for the SAMP will be specific to projects and not to Corps permits. At this time, no general certification has been prepared, however, Regional Board staff has developed a list of projects/types of projects proposed for certification and presented this list to stakeholders. The proposed SAMP general certification being considered at this time would only apply to activities in the San Diego Creek watershed. Projects that are not covered under the general certification would be considered individually.

As a matter of information, Regional Board staff has also initiated the development of a general Certification for limited flood control maintenance activities throughout the Region, such as re-contouring roadside drainage ditches, clearing of culverts and debris in fully-improved flood control channels and the repair of certain flood control structures. This effort is largely in response to additional requests for a programmatic certification approach, particularly by the City of Hemet, as well as in response to the San Diego Creek SAMP. Public notification that staff is developing this general certification for the entire Santa Ana Region has already occurred, and a draft general certification is currently undergoing in-house review. The California Department of Transportation has provided preliminary comments on the scope of the general certification and those comments have been addressed in the working draft.